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No. 84-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

BRIEF IN OPPOSITION BY RESPONDENTS McCREARY ET AL.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT 3

REASONS FOR DENYING THE WRIT 8

I. The Court of Appeals' Holding is Consistent with *Widmar v. Vincent*, *Lynch v. Donnelly* and other Decisions of this Court 8

II. The Holding of the Court of Appeals Presents No Conflict with any Decision of any other Court of Appeals 12

III. Petitioners have not identified a Governmental Interest Sufficient to Warrant an Abridgement of First Amendment Rights 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: PAGE

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 14

ACLU v. Rabun County Chamber of Commerce, 678 F.2d 1379 (11th Cir. 1977) *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983) 12

Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) 6, 13

American Civil Liberties Union v. City of Birmingham, Civ. No. 83-3348 (E.D. Mich. July 23, 1984).....13 n.3

Bob Jones University v. United States, 103 S.Ct. 2017 (1983) 14

Citizens Concerned for Separation of Church and State v. City and County of Denver, 526 F. Supp. 1310 (D. Colo. 1981), *aff'd*, No. 82-1022 (10th Cir. filed May 14, 1984)..... 13

Clark v. Community for Creative Non-Violence, 52 U.S.L.W. 4986 (U.S. July 2, 1984)..... 10

Evans v. Newton, 382 U.S. 296 (1966) 14

Florey v. Sioux Falls School District, 619 F.2d 1311 (8th Cir. 1980) *cert. denied*, 449 U.S. 987 (1980)..... 13

Freedman v. Maryland, 380 U.S. 51 (1965) 15

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 10

Gregory v. Chicago, 394 U.S. 111 (1969) 9

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 14

Lynch v. Donnelly, 104 S.Ct. 1355 (1984)..... *passim*

Members of the City Council v. Taxpayers for Vincent, 104 S.Ct. 2118 (1984)..... 14

PAGE

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981) 14

Niemotko v. Maryland, 340 U.S. 268 (1951) 15

Norwood v. Harrison, 413 U.S. 455 (1973) 14

Rubin v. Village of Scarsdale, 440 F.Supp. 607 (S.D.N.Y. 1977)..... 5

Saia v. New York, 334 U.S. 558 (1948)..... 15

Shelly v. Kraemer, 334 U.S. 1 (1948)..... 14

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 14

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1974) 12, 14, 15

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)..... 9, 15

United States v. Grace, 103 S.Ct. 1702 (1983)..... 10

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)..... 14

Widmar v. Vincent, 454 U.S. 263 (1981).....*passim*

Wooley v. Maynard, 430 U.S. 705 (1977)..... 14

Other Authorities:

Supreme Court Rule 17 8

U.S. Const. Amend. I.....*passim*

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Respondents.

BRIEF IN OPPOSITION BY RESPONDENTS McCREARY ET AL.

Soon after the decision in *Lynch v. Donnelly* 104 S.Ct. 1355 (1984), this Court is being asked to decide whether a local Village government may prohibit a display during the Christmas holidays of a privately owned creche in a public park which is a focal point of the Village's traditional observance of Christmas. Indeed, this is the very case referred to by Justice Brennan in his dissent in *Lynch*.

> Inclusion of the creche [Pawtucket's] is not necessary to accomodate individual religious expression. This is plainly not a case in which individual residents of Pawtucket have claimed the right to place a creche as part of a wholly private display on public land. Cf. . . . *McCreary v. Stone*, 575 F. Supp. 1112 (1983). *Lynch*, at 1382.

The courts below were faced with reconciling Establishment Clause issues with Free Speech issues. The Respondents' First Amendment rights of free speech are not being asserted in face of a government regulation, narrowly drawn to further a substantial governmental interest unrelated to the suppression of free speech.

The unanimous decision of the Court of Appeals for the Second Circuit concluded that the Village of Scarsdale, New York, would not contravene the Establishment Clause by allowing the display of a creche in Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season. Further, the Court of Appeals confirmed the District Court's finding that the Village's prohibition of the creche display was content based. (Pet. App. 24a-25a).[1]

In light of this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Lynch*, and its decisions dealing with the abridgement of First Amendment Rights in traditional public forums, that conclusion was correct. The decision below presents no conflict with any decision of this Court or of any other Court of Appeals. The Petitioners have still not identified a governmental interest sufficient to warrant an abridgement of First Amendment Rights in traditional public forums. Further appellate review is therefore unwarranted and certiorari should be denied.

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[1] "Pet." refers to the Petition for Certiorari, "Pet. App." to the Appendix to the Petition for Certiorari, "J.A." to the Joint Appendix in the Court of Appeals, "J.Ex." to the Exhibit Volume thereto, and "Stip. Ex." to exhibits included in the stipulated materials in the District Court record.

STATEMENT

1. *The Citizens Group.* Respondents McCreary, et al. (the "Citizens Group") were all residents of the Village of Scarsdale at the time of the commencement of this case and are not representatives of any church or religious institution. Four of the members of the Citizens Group, along with 13 other residents, submitted an application to the Board of Trustees of the Village to display a creche in Boniface Circle during the 1982 Christmas season. The applicants stated that the request for the display was for the purpose of availing themselves of their "constitutional right of freedom of religious expression." (J. Ex. 94).

After the Board's denial of this application, the Citizens Group Respondents submitted a similar application for the 1983 Christmas season in February, 1983. The full text of this application appears below:

> The undersigned respectfully request permission to erect a "Creche" (*i.e.*, the Nativity Scene) on Boniface Circle between December 17, 1983 and December 26, 1983. This Creche is small and tasteful and is similar to a display which has been placed on Boniface Circle for many years during the Christmas season. This Creche is private personal property and should not be confused with the similar Creche owned by the Scarsdale Creche Committee on behalf of various Scarsdale Churches and Congregations.
>
> All expenses and costs of the erection and removal of the display will be borne by the applicants, as well as any direct or indirect maintenance costs incurred on the Boniface Circle premises. A notation will be placed on the display indicating that it is made by private citizens and that the Village of Scarsdale does not support or sponsor the display.

> Among the several purposes of the undersigned in making this request are desires to join in the Village's celebration of Christmas by giving recognition to the birth of Jesus Christ the occasion and namesake of the holiday, to communicate the Christmas message of peace and good-will to the Scarsdale community, to celebrate and express religious convictions, and to evoke a spirit of religious toleration and freedom of expression which is fundamental to the well being of our Village and our nation, all of which purposes are grounded in the undersigned's civil and Constitutional rights of free speech and religious expression. (J. Ex. 95-97).

2. *The Lack of Regulations.* There is no published statute, law, ordinance, rule or regulation in effect in Scarsdale that requires persons wishing to use Scarsdale's parks or other public properties first to apply for permission from the Board of Trustees; and there are no published standards upon which the Board bases its decisions to grant or deny applicants permission to use Scarsdale's parks or other public properties. (Pet. App. 3a-4a). There are no regulations in Scarsdale pertaining to the use of Boniface Circle and other parks in Scarsdale other than those dealing with leaving the site in a clean and orderly condition, responsibility for damage and possible requirements to obtain public liability insurance, that are relevant to this case.

3. *The Creche Tradition in Scarsdale.* For 24 successive years, the Village of Scarsdale, acting through its Board of Trustees, permitted a display by a committee of representatives of several area churches (the "Creche Committee") of a privately-owned creche in Boniface Circle for a short period of time during each Christmas season. The creche was erected, maintained and taken down by the Creche Committee. No public expense was involved in the display; the Village merely permitted access to the park. During this period, according to the Village Manager, the chief operating officer of the Village

since 1961, no one ever complained about the length of time the creche was displayed, and the display never created a single traffic or safety problem. Further, the record in this case discloses no evidence that the display of the creche in Boniface Circle interfered with the rights of others to the use of the park.[2] Further, the District Court did not find that "many" creches are "widely" displayed throughout the Village of Scarsdale. (Pet. 9 and 19).

Boniface Circle is the most appropriate site in the Village for a creche display. Each year the Scarsdale Chamber of Commerce (of which the Village is a member), after application to and approval by the Village, decorates the area in and around Boniface Circle with festive Christmas lights and garlands. In 1982, the large evergreen tree in Boniface Circle was decorated with Christmas lights by Village employees at the request of the Town Club, a private civic organization. The electricity for all these lights was paid for by the Village. In 1982 also, the annual Town Club-sponsored Christmas carol sing for Villagers took place at Boniface Circle as it had in several earlier years. The repetoire included songs honoring the birth of Christ. As a regular feature of this event, Santa Claus arrived in a Village fire truck and the Deputy Mayor welcomed all Villagers in attendance.

4. *The Creche "Controversy" in Scarsdale.* After some early questioning, the annual creche display in Boniface Circle was largely a non-issue confined to routine Board approvals until a member of the American Civil Liberties Union brought suit in 1976 challenging the constitutionality of the creche on grounds that the display violated the Establishment Clause. *Rubin v. Village of Scarsdale*, 440 F.Supp. 607 (S.D.N.Y. 1977). In this action the Village advised the court that:

> Defendant Village and its officials acted in regard to the Creche Committee's request in a manner no different

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2 If the decision of the Circuit Court is allowed to stand, the Citizens Group will defer to and support the Creche Committee's next application to display their creche in Boniface Circle.

than it would if presented with a similar request from a similar organization. (J.Ex. 103).

* * *

. . . that neither the intentions nor motives of defendant, Scarsdale Creche Committee, whether expressed or implied may be imputed to or attributed to the defendant, Village. . . . The Board of Trustees permitted a group of residents to use Village property as it would permit any other similar group seeking such permission. (J.Ex. 112).

Rubin was dismissed on jurisdictional grounds. In response to the *Rubin* litigation, the Law Committee of the Board of Trustees reviewed an earlier decision by the District of Columbia Circuit in *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973). As a result of this review, the Board formulated the following text for a sign to be placed by the Creche Committee next to the creche:

> This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization.

In 1975, a Trustee began to vote against the annual creche display, and in 1976 stated that a "symbol of religion should not be on public property." (J.Ex. 50). In subsequent years, additional Trustees voted against the creche display. In 1981, the Board by a 4-3 vote denied the Creche Committee permission to display the creche in Boniface Circle. As a result of this denial and the subsequent denials in 1982, as the District Court found, a "small uproar" occurred in Scarsdale. This consisted mainly of letters and signed petitions addressed to the Board, and in particular to Mayor Jean Stone, who had cast the deciding vote against the creche in 1981, although in earlier years as Trustee she had voted for the creche display. These letters and petitions, which are in the District Court record, were overwhelmingly in favor of maintaining the tradition of the creche display. Contrary to the assertion by the Petitioners (Pet. 18), there is nothing in the record in this case to suggest that these letters and petitions were not representative of the position of the majority of Scarsdale residents.

Although the District Court found that some candidates for the Board of Trustees have stated a position on the creche display, the record is clear that voting in Scarsdale has not yet been affected by the creche issue. (J.A. 48, paras. 103-109). Despite the attempt of the Petitioners to color the creche controversy as "fierce" and involving "threats", the controversy in Scarsdale has been peaceful.

5. *The Village's Defense.* Until the Village's answer to the Citizens Group's Complaint on March 30, 1983, the Village never took the position that it was in any way sponsoring the display of a creche or that a private display without any government expense, constituted an establishment of religion. When the Board, at an open meeting in December 1982, denied the residents permission to display a creche, it advanced no reasons for the denial. (J. Ex. 84-92). According to the Chairman of the Board's Law Committee, the Board did so because four Trustees found the display to be "socially undesirable". (Stip. Ex. 66, *The Scarsdale Inquirer*, December 16, 1982, p. 1).

In the proceedings below, the Village conceded that the creche display was a form of speech for First Amendment purposes and that the denials were content-based. Indeed the Village now argues, beyond Establishment Clause considerations, that despite having no contravailing content-neutral regulations supporting an independent substantial governmental interest, that this Court support the ban of the creche because of the content of its message.

6. *The Proceedings Below.* The District Court and the Court of Appeals were in large measure consistent in their analysis. As Petitioners state, the decisive point of disagreement was the Court of Appeals' conclusion that allowing the creche in Boniface Circle would not "have the direct and immediate effect of advancing religion" (Pet. 12), particularly in light of this Court's decision in *Lynch v. Donnelly.*

The Court of Appeals held that the Village would not contravene the Establishment Clause by allowing the display of the creche in Boniface Circle, a traditional public forum, for a period of about two weeks during the Christmas holiday season. It reversed the judgment of the District Court and remanded for the entry of an injunction prohibiting the Village from relying on the Establishment Clause as a reason for prohibiting erection of a creche in Boniface Circle and for further action regarding the adequacy of the existing disclaiming sign used by the Creche Committee. (Pet. App. 25a).

REASONS FOR DENYING THE WRIT

This is not a case in which there are "special and important reasons for granting certiorari". S.Ct. R.17(1). The conclusions of the Court of Appeals were correct based on the holdings of this Court in *Widmar v. Vincent*, *Lynch v. Donnelly* and its decisions dealing with the abridgement of First Amendment rights in traditional public forums like Boniface Circle. The holding of the Court of Appeals presents no conflict with any decision of this Court or any other Court of Appeals. The Petitioners have still not identified a governmental interest sufficient to warrant an abridgement of the First Amendment rights of the Citizens Group Respondents.

I. The Court of Appeals' Holding is Consistent with *Widmar v. Vincent*, *Lynch v. Donnelly* and other Decisions of this Court

The decision of the Court of Appeals below is not a "remarkable widening of the free speech rule" of *Widmar v. Vincent*. (Pet. 14). This case is well within the confines of *Widmar* and all other decisions of this Court that may constitute the "free speech rule". *Widmar* was based on a determination that the University of Missouri had created by its open access policy to student groups, a limited public forum. In this case both the District Court and the Court of Appeals found, and now the Village concedes on appeal that Boniface Circle,

like most parks, is "a traditional public forum". (Pet. 9). In addition, the University in *Widmar* sought only to prevent a student group from using its property; it did not seek to completely exclude the group from an important University event. In the present case however, the Village has attempted to ban the Citizens Group from participating in the Village's Christmas celebration. The Village, unlike the University, is actively involved in this celebration, permitting and endorsing symbols and other conduct concerning the Christmas holidays to be displayed and carried on in Boniface Circle and its immediate environs. After many years of taking a proper neutral stance of accomodation, the Village officials since 1981 have chosen to deny the Citizens Group and the Creche Committee access to Boniface Circle to present their Christmas message identifying the holidays with the birth of Christ.

The Court of Appeals found that "it is undisputed that throughout the years covered by this litigation, Scarsdale, acting through its Board, usually granted requests for access to and use of its parks and public properties. Rather than issue a complete denial, on each occasion that it did not grant a specific request, the Board usually chose to approve access to and use of alternative public property." (Pet. App. 4a). Nonetheless, the Village argued below and continues to argue that it has the right to single out the Respondents alone and deny them access to make their statement in Boniface Circle or alternative public forums in the Village. At the same time, it regularly permits religious symbolic displays in and uses of its public facilities, particularly by non-Christian groups, presumably because no one in the Village has objected to this accomodation. (Pet. App. 4a-5a; Pet. 4).

This Court has consistently held that absent a showing that the mode of communication interferes with the rights of others, or is basically incompatible with the normal activity of a particular place at a particular time, (*e.g.*, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969);

and *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)) only reasonable time, place and manner restrictions, content neutral and narrowly drawn to serve a significant governmental interest may permissibly abridge the exercise of First Amendment rights in traditional public forums. *United States v. Grace*, 103 S.Ct. 1702 (1983). No such rules or regulations exist in Scarsdale, and no showing has been made that the annual temporary display of a creche in Boniface Circle interferes with the rights of others. *Cf.*, *Clark v. Community for Creative Non-Violence*, 52 U.S.L.W. 4986 (U.S. July 2, 1984).

The decision of the Court of Appeals below is not a "marked extension" of *Lynch v. Donnelly.* (Pet. 14). In *Lynch*, this Court stated that it has invalidated government action in respect of the Establishment Clause "only when it has concluded there is no question that the . . . activity was motivated wholly by religious considerations". *Lynch* at 1362. Faced with the holding in *Lynch* that a government's display of a creche during the Christmas season does not violate the Establishment Clause, the Petitioners are forced to argue that *Lynch* is distinguishable. *Lynch*, however, may not be distinguished on any legally significant ground.

Contrary to the Petitioners' contention, the context of Pawtucket's display and the display in Boniface Circle are strikingly similar, both being in the context of a larger holiday display and celebration. In *Lynch*, the Pawtucket park was decorated with "many of the figures and decorations traditionally associated with Christmas . . ." *Lynch* at 1358. In Scarsdale, lamp posts in and around the park, and a large evergreen tree in the park are decorated with Christmas lights and ornaments of various kinds, and the park is the site of Christmas carol sings and visits by Santa Claus. In fact, Boniface Circle is the principal locus of the Village's Christmas celebration. (Pet. App. 29a). In short, the display in Boniface Circle, like Pawtucket's display,

> is essentially like those to be found in hundreds of towns and cities across the nation—often on public grounds—during the Christmas season. *Lynch* at 1358.

Indeed, this Court forcefully stated:

> To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places . . . would be a stilted over-reaction contrary to our history and to our holdings. *Lynch* at 1365.

The Petitioners suggest that the creche display in Boniface Circle promotes divisiveness and administrative entanglement. (Pet. 22). The District Court and the Court of Appeals below were both unimpressed with this argument. The District Court stated:

> The record does indicate the existence of a "divisive political potential" . . . However, a result in the lawsuit, one way or the other, would seemingly leave little to further political debate, and accordingly we do not see the divisiveness element as contributing much to entanglement. (Pet. App. 52a-53a)

In this case, as in *Lynch*, "there is no evidence of contact with church authorities concerning the content or design of the exhibit . . . No expenditures for maintenance of the creche have been necessary. . . In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries." *Lynch* at 1364.

Because in this case the Citizens Group Respondents' creche is privately owned and because the Citizens Group Respondents are not affiliated with any church, there is no interaction at all between church and state concerning the creche. Consequently, there is no administrative entanglement.

This Court's holding in *Lynch* that government sponsorship of a creche during the holiday season would not violate the Establishment Clause precludes the assertion that the mere "appearance of public sponsorship or endorsement or ap-

proval" (Pet. 16) would constitute such a violation by the Village in this case. In *Lynch*, where government support was actual—not merely perceived—the effect of such support was characterized as an "indirect, remote or incidental benefit" nct constitutionally infirm. *Lynch* at 1364.

The Citizens Group has never demanded "compulsory subsidization of their religious views" (Pet. 19), and there is nothing in the record to support such an inference. The District Court carefully distinguished the Citizens Group's motives from the Creche Committee's stating:

> In short, it appears that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is public land. The position of the Citizens Group on this issue is simply that it has the right to place its creche on public property and therefore is not willing, pending outcome of this lawsuit, to settle for a private site. (Pet. 37a-38a).

The Citizens Group Respondents' right to display their creche on public land is no way affected by the availability of private sites, presumably their homes. "Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of expression in appropriate places abridged on the plea that it may be exercised in some other place'. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (citation omitted) (1974).

II. The Holding of the Court of Appeals Presents No Conflict with any Decision of any other Court of Appeals

The decision of the Circuit Court below is not in conflict with *ACLU v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982); *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983). *Rabun* involved a *permanent* cross erected on the side of a mountain in a state park, not a traditional public forum like Boniface Circle, nor even a

limited public forum as created by the University of Missouri. Indeed, as the Petitioners point out, there was no attempt in *Rabun* to justify the maintenance of the cross (a permanent structure) as permissible or required under *Widmar.* (Pet. 23 n.8).

The holding of the Court of Appeals is entirely consistent with *Allen v. Morton*, *supra*, *Florey v. Sioux Falls School District*, 619 F.2d 1311, 1316 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980), and *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 526 F. Supp. 1310 (D. Colo. 1981), *aff'd*, No. 82-1022 (10th Cir. filed May 14, 1984), the three known cases other than *Lynch* dealing with creche displays decided by federal Courts of Appeals.[3]

III. Petitioners have not identified a Governmental Interest Sufficient to Warrant an Abridgement of First Amendment Rights

The decision of the Circuit Court below prohibits the Village of Scarsdale from relying on the Establishment Clause for the reason for banning a creche display in Boniface Circle. It noted that the Village's prohibition was a problem because it was content-based (Pet. App. 24a-25a). In the Court of Appeals, the Village abandoned its argument that Boniface Circle is not a traditional public forum, but now in its Petition nevertheless suggests that it is a "special part of home" (Pet. 17), where "limits on symbolic communication, or even on political speech, may properly be allowed in cases where the counter-

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3 There is pending in the Court of Appeals for the Sixth Circuit an appeal filed on September 6, 1984 from the decision in *American Civil Liberties Union v. City of Birmingham*, Civ. No. 83-3348 (E.D. Mich. July 23, 1984), docketed in the Court of Appeals as No. 84-1637. Distinguishing *Lynch* and the decision of the Court of Appeals below, the District Court found that a display of a city-owned creche standing alone on the lawn in front of City Hall during the Christmas season without a disclaimer sign, and erected, maintained, illuminated and stored by public employees in public facilities, violated the Establishment Clause.

vailing interests at stake are themselves of constitutional dimension." (Pet. 19).

What the Village has done and is continuing to do by abstract argument and reliance on clearly distinguishable authorities is particularly repugnant to the principles of the First Amendment.

No countervailing interest of constitutional dimension other than the Establishment Clause has been identified in this case. *Cf.*, *Shelly v. Kraemer*, 334 U.S. 1 (1948); *Evans v. Newton*, 382 U.S. 296 (1966); *Norwood v. Harrison*, 413 U.S. 455 (1973); and *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983), cited by the Petitioners. This case does not involve a permanent or other display, where a separate governmental interest sufficient to warrant an abridgement of a claimed free speech right, was at stake. *Cf.*, *Members of the City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981); and *Lehman v. City of Shaker Heights* 418 U.S. 298 (1974), cited by the Petitioners. No showing has been made in this case that the temporary display of a privately-owned creche by citizens in context of surrounding Christmas decorations in a traditional public forum compels persons to "support ideas they find repugnant to their moral religious and political beliefs." (Pet. 17). *Cf.*, *Wooley, v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), cited by the Petitioners.

A local government which can arbitrarily grant or deny the right to speak according to what it deems to be "socially desirable", or in the "public interest" or "welfare" of the community is indistinguishable in all relevant respects from a censor. This Court has consistently held that such prior restraint without adequate standards is precisely the sort of abuse against which the First Amendment was primarily directed. *See*, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1974); *Shuttlesworth v. Birmingham*, 394

U.S. 147, 153 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); and *Saia v. New York*, 334 U.S. 558, 559 (1948).

If the Village of Scarsdale wishes to regulate speech, then it must undertake the burden to show a precise nexus between that speech and some evil that it has a right to prevent. Further, the Village must make a "specific showing of constitutionally valid reasons" for doing so. *Tinker v. Des Moines Independent Community School District*, *supra*, at 511. If the First Amendment means anything at all it requires at least that a speaker be given a judicial determination that such a nexus or valid reason exists before the state can silence him. An undefined "Lex Scarsdale" based wholly on the political temperaments of its public officials is not sufficient. *See*, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); and *Southeastern Promotions Ltd.*, *supra*, at 560. No such nexus or valid reason has been demonstrated in this case, nor do they exist.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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